Supreme Court, U.S.
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No. 91-2074

Supreme Court of the United States

October Term 1991

Anton Baumann,

Petitioner,

vs.

United States of America,

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE SEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## I. QUESTION PRESENTED FOR REVIEW

The Respondent, United States of America, brought an action against Anton Baumann, Petitioner, pursuant to § 340(a) of the Immigration and Nationality Act of 1952, as amended, to revoke the United States citizenship of Petitioner, to set aside his May 14, 1957 admission to citizenship, and to cancel his Certificate of Naturalization. The United States District Court, by Decision dated May 17, 1991, granted the relief sought by the Respondent. Is that ruling and the subsequent ruling of the United States Court of Appeals for the Seventh Circuit, which affirmed the Judgment of the trial court, inconsistent with a Decision of the United States Court of Appeals for the Sixth Circuit entitled, Petkiewytsch vs. INS, 945 F.2d 871 (6th Cir. 1991)?

## II. LIST OF PARTIES

The parties to the Petition are those shown on the cover.

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The Petitioner, Anton Baumann, respectfully prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 23, 1992.

## III. OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reprinted in the Appendix hereto at App. 8.

The Memorandum Decision of the United States District Court for the Eastern District of Wisconsin (Curran, D. J.) is reprinted in the Appendix hereto as App. 21 and 31.

## IV. JURISDICTION

The date of the Decision of the United States Court of Appeals for the Seventh Circuit was March 23, 1992.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1) providing for review by this Court of cases in the Court of Appeals by Writ of Certiorari upon the petition of any party.

## V. STATUTE INVOLVED

The principal statute involved is 8 U.S.C. § 1451(a) which reads as follows:

> § 1451. Revocation of naturalization
>
> (a) Concealment of material evidence; refusal to testify
>
> It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: Provided, That refusal on the part of the naturalized citizen within a period of ten years following his

naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

## VI. STATEMENT OF THE CASE

### A. District Court Jurisdiction.

Subject matter jurisdiction in the District Court was based upon 28 U.S.C. § 1345; 8 U.S.C. § 1421(a); 8 U.S.C. § 1451(a).

### B. Proceedings Below.

This action was commenced by the United States of America on March 29, 1989 alleging, among other things, that the Petitioner served as an armed guard at a Nazi concentration camp and that because of this service he was excludable from the United States and therefore procured his citizenship illegally. On May 17, 1991, by Opinion and Order, the District Court granted judgment in favor of the United States. The Petitioner then appealed to the United States Court of Appeals for the Seventh Circuit. That Court, on March 23, 1992, affirmed the Judgment of the District Court.

C. **Statement of Facts.**

The statement of facts as set forth by the District Court in its Order of May 17, 1991 may be considered by the Court as the statement of the Petitioner for purposes of this Petition except insofar as it finds Petitioner to have been an "armed guard."

D. **Reasons for Allowing the Writ.**

The Decision of the Court of Appeals for the Seventh Circuit is in the opinion of the Petitioner inconsistent with the Decision of the Sixth Circuit Court of Appeals in Petkiewytsch v. INS, 945 F.2d 871 (6th Cir. 1991). The Petkiewytsch Decision interpreted the Decision of this Court in its Decision in Fedorenko v. United States, 449 U.S. 490 (1981). Petkiewytsch held

> the Supreme Court held that Fedorenko's involuntary service as an armed guard at Treblinka disqualified him as a matter of law from admission to the United States under the Displaced Persons Act.

As pointed out by the Court, the "linedrawing" in cases under the Holtzman Amendment has been particularly difficult and has produced conflicting results. In discussing rulings of the Seventh Circuit Court of Appeals, the Petkiewytsch court pointed out that the Seventh Circuit had specifically rejected the argument that an individual must have actively or personally participated in persecution to be deportable under the Holtzman Amendment. The Ninth Circuit in Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985), said deportability under § 1251(a)(19)

> may only be sustained where the evidence establishes that the individual in question personally ordered, incited, assisted, or otherwise participated in the persecution of individuals.

The Ninth Circuit relied on note 34 of the Fedorenko Decision in concluding that a proper analysis under Holtzman is "whether there was proof of personal, active

assistance or participation in persecutorial acts." The Sixth Circuit then points out its view of the legislative history of the Holtzman Amendment. It is difficult to point out the rationale of the Seventh Circuit in this matter in view of the fact that it merely issued an Order affirming the Judgment of the District Court. That requires an analysis of the Opinion of the District Court. It is clear from that Opinion that there is no evidence of any conduct of the Petitioner at the camps. The principal evidence is based upon a guard roster, and there is no testimony whatsoever, nor is

there any finding, that anyone ever observed Petitioner at any camp or in fact as a guard.

The conflict between the Courts of Appeals for the Sixth Circuit and the Seventh Circuit is clear. The Sixth Circuit held, in effect, that there must be evidence of personal conduct under Fedorenko to warrant deportability. The Seventh Circuit in affirming the trial court in this case let stand its previous interpretations of Fedorenko. Those Decisions in United States v. Schmidt, 923 F.2d 1253 (7th Cir. 1991); United States v. Schellong, 717 F.2d 329 (7th Cir. 1983); United States v. Kairys, 782 F.2d 1374 (7th Cir. 1986); and Kulle v. INS, 825 F.2d 1188 (7th Cir. 1987) require no evidence of actual participation.

The differences in the Circuits are so substantial that it requires the interpretation by this Court so that the citizens in this country are treated fairly

and not on the happenstance of which Circuit they reside in.

## VII. CONCLUSION

We respectfully request that this Court grant a Writ of Certiorari in this matter for the reasons set forth above.

Dated this 15th day of June, 1992.

Respectfully submitted,

By: David J. Cannon

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Attorney for Petitioner,
Anton Baumann

No. _____

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Supreme Court of the United States

October Term 1991

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Anton Baumann,

Petitioner,

vs.

United States of America,

Respondent.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE SEVENTH CIRCUIT**

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**APPENDIX FOR WRIT OF CERTIORARI**

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 3, 1992[1]
Decided March 23, 1992

Hon. WILLIAM J. BAUER, Chief Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff/Appellee

No. 91-2649

v.

ANTON BAUMANN,

Defendant/Appellant

Appeal from the States District Court for the Eastern District of Wisconsin

No. 89-C-362
Thomas J. Curran, Judge.

ORDER

In a judgment rendered on May 17, 1991 the district court revoked Anton Baumann's citizenship and canceled his naturalization

[1] After scheduling this case for oral argument, the court vacated its order upon motion by counsel for the appellant. This appeal was submitted on the briefs without oral argument.

pursuant to 8 U.S.C. § 1451(a). Section 1541(a) allows for revocation of citizenship that was "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation. The district court found that because of Baumann's service as an armed guard at a Nazi concentration camp during Work War II, he was not lawfully admitted upon to United States. In addition, because he gave false testimony for the purpose of obtaining immigration benefits, he lacked the moral character required for naturalization. We affirm.

BACKGROUND

The critical facts in this case involve Baumann's alleged service in the Waffen-SS and his failure to note this service when applying for an immigrant visa and later naturalization. Baumann, of ethnic German origin, was born on May 17, 1911 in Such Borova, Yugoslavia. After four years of schooling in Such-Borova he worked there as a

carpenter's apprentice and then as a carpenter. In 1936 he married and in 1941 he had a child. He served in the Yugoslavian army from November 1937 through May 1941.

The Waffen- SS ("SS") was the elite guard and intelligence unit of the Nazi Party. The SS-Totenkopf Sturmbann ("Death's Head Batallion") was the section of the armed SS formed for the purpose of guarding the Nazi concentration camps. Baumann's history with the SS death's Head Battalion was documented by an SS Personnel Data Card and a roster of the SS Death's Head Battalion at Stutthof Concentration Camp ("Stutthof"). Baumann stipulated to the authenticity of these documents.

The SS Personnel Data Card includes a picture of Baumann in the Death's Head Batallion uniform and identifies Baumann by his correct date and place of birth, profession, spouse, ethnic German origin, the number and sex of his children and prior

military service. The roster identifies Baumann by place and dated of birth and by his spouse's name and place of birth.

According to these documents, Baumann began service with the SS on November 18, 1942 and was a member of the Death's Head Battallion. From November 19, 1942 until September 1943, he served as an armed guard at Stutthof, near Danzig Germany. The parties stipulated that the operation of Stutthof constituted activity or conduct contrary to civilization and human decency on behalf of the Axis countries during World War II. In September 1943, he was transferred to Buchenwald Concentration Camp.

Baumann entered the United States under the Displaced Persons Act of 1941 ("DPA"), Pub. L. No. 80-774, § 2, 62 Stat. 1009, amended by Pub. L. no. 81-555, 64 Stat. 219 which authorized European refugees to emigrate to the United States after World War II. The DPA excluded individuals who

"assisted the enemy in persecuting civilians."

On June 15, 1950, Baumann applied for and was granted an Immigrant Visa and Alien Registration at the U.S. Consulate in Salzburg, Austria. On his Application for Immigrant Visa, he responded that his place of residence from 1925-1944 was Such-Borova, Yugoslavia. He did not disclose his membership in the SS, his tenure at Stuffhof or the nature of his duties there. Baumann swore under oath to the truth of the statements on his application. His was admitted to the United States at the Port of New York City on July 5, 1950.

In 1957, Baumann filed an "Application to File Petition for Naturalization" and a "statement of Facts for Preparation of Petition" (collectively INS Form N-400) with the Immigration and Naturalization Service. Question 9 of Form N-400 asked his to list every organization, association or group in

which he had been a member and Baumann responded "None." Provision 19 of the form provided that "no person shall be regarded as a person of good moral character who...has given false testimony for the purpose of obtaining any benefits under the Immigration and Naturalization laws." He swore under oath before a naturalization examiner that all his answers were true and then filed his Petition for Naturalization. On May 14, 1957, his Petition for Naturalization was granted and he was issued a Certificate of Naturalization.

District Court Proceedings

Baumann made no attempts to rebut the Government's case. He refused to answer questions at his deposition, asserting a Fifth Amendment privilege. He did no testify at trial and presented no witnesses on his behalf. The Government presented two survivors of the Stutthof camp who described the conditions during the November 1942 to

December 1943 time period. Including vivid description of brutal atrocities committed by members of the Death's head Batallion. The Government also presented testimony of Dr. Charles Snydor, a recognized expert on the SS and Frank Walters who was a visa analyst with the State Department during the time Baumann applied for his visa.

The government was required to prove its case by clear and convincing evidence. The district court found that the government had met this burden by proving that baumann served as an armed guard at Stuffhof. Therefore, he was ineligible for a visa under the DPA. Moreover, by giving false testimony for the purpose of obtaining immigration benefits, he lacked the statutorily required good moral character prerequisite to becoming an American citizen.

ANALYSIS

Baumann does not dispute the contents of his visa and petition of naturalization. He

does not dispute the fact that service as an armed concentration guard would have barred him from obtaining his visa under the DPA. Nor does he dispute that giving false information on his visa application and petition for naturalization constitutes lack of requisite moral character required for naturalization.

Therefore, the only issue on appeal is the factual determination that he was an armed guard at Stutthof. Baumann argues that because there was no testimony that anyone saw him at Stutthof and no testimony that he was seen with a gun, there is insufficient evidence to revoke his citizenship. He also argues that the testimony of Snydor was insufficient to meet the government's burden of proof. Finally, Baumann argues that because there was no proof of particular conduct by him, under the rationale of the recent Sixth Circuit decision in Petkiewytsch v. INS, 945 F.2d 871 (6th Cir. 1991), he

cannot be deported. All of these arguments are without merit.

We review the factual findings of the district court under the clearly erroneous standard. Fed. R. Civ. P. 52(a); United States v. Kairys, 782 F.2d 1374, 1379 (7th Cir. 1986). Although the government bears a heavy burden in a denaturalization proceeding, there must by strict compliance with congressionally imposed prerequisites to citizenship. Fedorenko v. United States, 449 U.S. 490, 506 (1980). As a matter of law, disclosure of the fact that a petitioner served as an armed guard at a concentration camp makes him ineligible for a visa under the DPA. Id. at 509. United States v. Kairys, 782 F.2d 1374 (7th Cir. 1986).

Baumann's contention that the government had to prove personal involvement is erroneous. If the government proved his service as an armed uniformed guard, it sufficiently established that he assisted in

persecution of persons because of race, religion or natural origin under section 13 of the DPA. U.S. v. Schmidt, 923 F.2d 1253, 1259 (7th Cir. 1991) (by proving that petitioner was a member of "Death's Head Battalion" at Sachsenhausen concentration camp, government met its burden).

The district court was not clearly erroneous when it determined that Baumann served as an armed guard at Stutthof. Contrary to Baumann's contention, the district court did not rely on Dr. Snydor's testimony or the underlying exhibits introduced as part of his testimony. It relied instead on the documents which Baumann stipulated to as authentic -- the SS Personnel Card which contains his photo and accurate identifying information, a photograph of Baumann in a Death's Head Batallion uniform, and the SS roster from Stutthof. In addition, the court relied on Walters' uncontroverted testimony that all

concentration camp guards were ineligible for United States' visas at the time the defendant filed his application.

In his reply brief, Baumann argues disingenuously that the stipulation as to authenticity is not as broad as the government contends and that he did not waive his right to challenge the accuracy of the information contained therein. This argument ignores the fact that at no point in this proceedings has Baumann attempted to rebut the government's allegations or challenged the veracity of the information contained in his Personnel Card, the SS Roster or the visa application. He does not claim that his is a case of mistaken identity. What little information he has provided during the proceeding includes his birth date, birthplace, marital information, ethnic origin, and occupation, all of which comport with the information contained on his SS Personnel Card. There is nothing in the

record challenging the accuracy of these documents, and therefore the district court decision was not clearly erroneous.

Petkiewytcsch v. INS, 945 F.2d 871 (6th Cir. 1991) does not change the result. It is a decision under the Holtzman Amendment and in fact recognizes that neither voluntariness nor proof of actual participation in atrocities are considerations under the DPA. Petkiewytsch stands for the narrow proposition that under the Holtzman Amendment, where it is undisputed that a permanent resident alien 1) served as an armed guard at a Nazi "labor education" camp involuntarily and under duress, and 2) did not personally commit acts of abuse, deportation is not required.

Petkiewytsch does not, as Baumann suggests, hold that under the DPA or the Holtzman Act, the government must prove that an individual served voluntarily and actually committed the acts of persecution. Moreover,

to the extent that it holds that personal involvement in atrocities is required for deportation under the Holtzman Amendment, Petkiewytsch conflicts with the law in this circuit. See Schellong v. INS, 805 F.2d 655, 661 (7th Cir. 1986) (purposes of DPA and Holtzman Act identical; insofar as cases from other jurisdictions hold that personal involvement is necessary to have assisted in persecution for purposes of the DPA or the Holtzman act, they conflict with Fedorenko).

By relying on Petiewytsch, Baumann is grasping at straws. The undisputed evidence shows that he was member of the SS who served as an armed guard at a concentration camp. As a matter of law, he was ineligible for a visa under the DPA.

CONCLUSION

For the foregoing reasons, the decision of the district court it

AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff, Case No. 89-C-362

v.

ANTON BAUMANN,

Defendant.

---

OPINION AND ORDER

The government commenced this action pursuant to section 304(1) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1451(a), seeking an order revoking and setting aside the May 14, 1957, Order of the United States District Court for the Eastern District of Wisconsin admitting the defendant to United States Citizenship and canceling his Certification of Naturalization No. 7676233. As grounds for this requested relief, the government maintains that Anton Baumann, as a member of the Waffen-SS, served as an armed guard at the Stutthof

Concentration Camp and that, as such, he was ineligible to be granted a visa to enter the United States and to receive his subsequent naturalization.

Jurisdiction is premised on 28 U.S.C. § 1345 and 8 U.S.C. §§ 1421(a) and 1451(a). A trial to the court was followed by a period of extensive briefing, and the following constitutes the court's findings of fact and conclusions of law.

FACTUAL BACKGROUND

Anton Baumann was born on May 17, 1911 in Such Borova, Virovitica District, Yugoslavia of German parentage. He was a carpenter by trade and in February 1936, he married Agnesa Schauer. He served in the Yugoslavian Army from November 1938 through May 1940.

In 1942, defendant began service with the Waffen-SS and, and a member of the SS Totenkopf-Sturmbann, served as an armed guard at the Stutthof Concentration camp near

Danzig, Germany. Members of the SS Totenkopt-Sturmbann or Death's Head Battalion wore grey/green uniforms with the Death's Head insignia on their collars. SS guards were responsible for preventing escape and were under orders to shoot prisoners attempting escape. Some guards were also charged with prisoners' work details which often resulted in the inhuman and brutish treatment of prisoners. The SS guards were paid and were allowed leaves. In September 1943, the defendant was transferred to SS guard duty at the Buchenwald Concentration Camp.

The parties have stipulated that the operation of Stutthof Concentration Camp constituted activity encompassed by the regulations, that is, conduct contrary to civilization and human decency.

In June of 1950, Baumann applied for admission to the United States at the U.S. Consulate in Salzburg, Austria. In his sworn

application for Immigration Visa and Alien Registration, Baumann provided that from 1925 until 1944, he resided in Such Borova, Yugoslavia. Baumann also orally swore to the truth of the information contained on the application.

In 1957, Baumann applied for naturalization. Question 9 of the application inquired as to the applicant's membership in any organizations, clubs or societies in the United States or in any other county before the last ten years. Baumann responded "none." This also was a sworn document. Provision 19 of the application provided that "no person shall be regarded as a person of good moral character who . . . has given false testimony for the purpose of obtaining any benefits under the Immigration & Naturalization laws." It then inquired whether the applicant had "at any time, either within or outside the United States, ever . . . committed [this] act []?"

to which Baumann answered "no." Anton Baumann became a citizen on May 14, 1957.

DISCUSSION

The government has asserted two independent bases for denaturalization: (1) that Baumann was not lawfully admitted to the United States as required by section 316(a)(1) of the Immigration and Naturalization Act, 8 U.S.C. §1427 because of his Waffen-SS service as a Nazi concentration camp guard and (2) that the false testimony he gave in obtaining his visa resulted in a lack of moral character required for naturalization by section 316(a)(3) of the Immigration and Nationality Act, 8 U.S.C. §1427(a)(3). If the government proves either of these contentions by proof that is clear, unequivocal and convincing, then Baumann's citizenship must be revoked. Schneiderman v. United States, 320 U.S. 118 (1943); Fedorenko v. United States, 449 U.S. 490 (1981); United

States v. Kairzy, 782 F.2d 1374, 1378 (7th Cir.), cert. denied, 476 U.S. 1153 (1986).

Government Exhibit 1.11 is an SS personnel card made out to Anton Baumann born on May 17, 1911 in Such Borova, Virovitica District, which the defendant has stipulated is his date and place of birth. It identifies Baumann as a "joiner" whose wife has the maiden name "Agnesa Schauer." The defendant has stipulated that his pre-war occupation was that of a carpenter and that his wife's maiden name was Agnesa Schauer. It identifies Baumann as having served in the Yugoslavian army from November 12, 1938 to May 12, 1940, to which the defendant has admitted. It indicates that Baumann is an ethnic German. Baumann identified himself as an ethnic German on his Application for Immigration Visa and Alien Registration. Also admitted into evidence is a photograph of the defendant in the Totenkopf-Sturmbann

uniform. There has been no challenge to the authenticity of these documents.

Frank Walters, a former Vice Council and visa analyst offered uncontroverted testimony that all concentration camp guards were ineligible for United States visas at the time the defendant filed his visa application.

There is no evidence as to what duties the defendant performed while assigned as a guard at the Stutthof Concentration Camp or that he was ever inside the Camp. Likewise, there is no evidence that Baumann personally mistreated or killed any prisoners. The fact that these events occurred approximately a half century ago makes such proof difficult if not impossible. By the same token, some might question the wisdom of committing substantial resources, both financial and human, to revoke the citizenship of a young man who lied forty-one years ago in order to start a new life in a new land. As former

Chief Justice Burger stated, "the way a society treats those who have transgressed against it is evidence of the essential character of that society," Hudson v. Palmer, 468 U.S. 517, 523-24; 104 S. Ct. 3194, 3199; 82 L.Ed.2d 393 (1984). In arriving at its decision, this court is mindful of the fact that Baumann has lived in the United States for over forty years, has raised a family, and been a productive member of society. At the same time, the court is mindful of the fact that Baumann entered the United States on an invalid visa and acquired that coveted citizenship unlawfully.

The Seventh Circuit recently recognized that even if a concentration camp guard did not personally participate in brutal acts, "the fact of his armed, uniformed services is sufficient to establish that he assisted in persecution." United States v. Schmidt, 1991 WL 8511 (7th Cir. January 30, 1991). The court must accordingly find that the

government has established by clear and convincing evidence that, as an armed guard at the Stutthof Concentration Camp, Anton Baumann was ineligible for a visa as having acquiesced in the Nazi persecutions. The court must further find that the government has established by clear and convincing evidence that by giving false testimony for the purpose of obtaining immigration benefits, pursuant to the Immigration Act of 1924, Anton Baumann lacked the statutorily required good moral character prerequisite to becoming a United States citizen.

It is accordingly ORDERED that the United States citizenship of Anton Baumann IS REVOKED and the Naturalization Order of May 14, 1957, is SET ASIDE.

IT IS FURTHER ORDERED that Certificate of Naturalization No. 7676233 IS CANCELED.

IT IS FURTHER ORDERED that the defendant shall, within 60 days from date hereof,

surrender and deliver his Certificate of Naturalization to the Attorney General.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this /s/ 17th day of /s/ May, 1991.

/s/ Thomas J. Curran
Thomas J. Curran
United States District Judge



BEST AVAIL

United States District Court
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

v.

JUDGMENT IN A CIVIL CASE

ANTON BAUMANN

Case No. 89-C-362

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came ~~to trial or~~ hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the United States citizenship of Anton Baumann is Revoked and the Naturalization Order of May 14, 1957, is set aside.

IT IS FURTHER ORDERED that Certificate of Naturalization No. 7676233 is Canceled.

ABLE COPY

IT IS FURTHER ORDERED that the defendant shall within 60 days from hereof, surrender and deliver his Certificate of Naturalization to the Attorney General.

May 17, 1991
*Date*

SOFRON B. NEDILSKY
*Clerk*

/s/ D. McLeod
*(By) Depute Clerk*

Supreme Court, U.S.
FILED
AUG 31 1992
OFFICE OF THE CLERK

No. 91-2074

# In the Supreme Court of the United States

OCTOBER TERM, 1992

ANTON BAUMANN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
*Solicitor General*

ROBERT S. MUELLER, III
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## QUESTION PRESENTED

Whether petitioner's service as an armed guard at a Nazi concentration camp rendered him ineligible for a visa under the Immigration Act of 1924.

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Statutes and regulations:


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| Act of Oct. 30, 1978, Pub. L. No. 95-549 (Holtzman Amendment), §§ 101-105, 92 Stat. 2065-2066 | 7 |
| 8 U.S.C. 1251(a)(19) | 7 |
| Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 | 5 |
| § 2(b), 62 Stat. 1009 | 5 |
| Immigration Act of 1924, ch. 190, 43 Stat. 153 | 3 |

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Immigration Act of 1990, Pub. L. No. 101-649, § 602, 104 Stat. 5077 ..... 7

§ 241(a)(4)(D), 8 U.S.C. 1251(a)(4)(D) (Supp. II 1990) ..... 7

Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*:

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§ 316(a)(1), 8 U.S.C. 1427(a)(1) ..... 3

§ 316(a)(3), 8 U.S.C. 1427(a)(3) ..... 4

22 C.F.R. (1949):

Section 53.32 ..... 6

Section 53.33 ..... 6

# In the Supreme Court of the United States

OCTOBER TERM, 1992

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No. 91-2074

ANTON BAUMANN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8-20) is unreported, but the judgment is noted at 958 F.2d 374 (Table).[1] The opinion of the district court (Pet. App. 21-30) is reported at 764 F. Supp. 1335.

### JURISDICTION

The judgment of the court of appeals was entered on March 23, 1992. On March 31, 1992, the court granted a motion to modify its order. See App., *infra*, 1a-3a. The petition for a writ of certiorari was filed

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[1] On March 31, 1992, the court of appeals modified its opinion. See App., *infra*, 1a-3a.

on June 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner was born in Such-Borova, Yugoslavia, in 1911. In November 1942, he began service with the Waffen-SS, the elite guard of the Nazi party. From November 1942 until September 1943, he was a member of the SS-Totenkopf-Sturmbann (Death's Head Battalion) and served as an armed, uniformed guard at the Stutthof concentration camp. In September 1943, he was transferred to the Buchenwald concentration camp. Pet. App. 9-11.

Petitioner's service as an armed guard at Stutthof was established by an SS Personnel Data Card and a roster of the Death's Head Battalion at Stutthof. The SS Card includes a picture of petitioner in a Death's Head Battalion uniform and identifies him by his date and place of birth, profession, spouse, ethnic German origin, the number and sex of his children, and the date of his prior military service. The roster identifies petitioner by place and date of birth and by his spouse's name and place of birth. Pet. App. 10-11.

SS guards were responsible for preventing prisoners from escaping and were under orders to shoot prisoners who attempted to escape. Some guards were also charged with conducting prisoner work details, which often resulted in the inhuman treatment of prisoners. The guards were paid and were permitted to take leave. Pet. App. 23. At trial, the parties stipulated that the operation of the Stutthof concentration camp constituted activity contrary to civilization and human decency. *Id.* at 11.

2. On June 15, 1950, petitioner applied to immigrate to the United States.[2] On his application for an immigrant visa, petitioner falsely listed his place of residence from 1925 to 1944 as Such-Borova, Yugoslavia, and did not disclose his residence at Stutthof or the nature of his duties there. Petitioner swore under oath to the truth of the statements on his application. He was admitted to the United States on July 5, 1950. Pet. App. 12, 24.

In 1957, petitioner applied for naturalization. Question 9 of the application form required him to list every organization, association, or group of which he had been a member. Petitioner responded "None," and swore under oath that all of his answers were true. On May 14, 1957, petitioner was naturalized as a United States citizen. Pet. App. 12-13.

3. On March 29, 1989, the government brought suit under Section 340(a) of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1451(a), to revoke petitioner's citizenship. After a three-day trial, at which petitioner offered no evidence or testimony to rebut the government's case, the district court found that as a result of his service as an armed guard at Stutthof, petitioner had been ineligible for a visa. The court therefore held that petitioner's citizenship was illegally procured because he was not lawfully admitted with a valid visa, as required by Section 316(a)(1) of the INA, 8 U.S.C. 1427(a)(1). The district court also found that peti-

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[2] Petitioner entered the United States under the Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924 Act). Regulations promulgated under the 1924 Act denied admission to anyone who had "acquiesced in activities or conduct contrary to civilization and human decency." App., *infra*, 1a-2a.

tioner gave false testimony for the purpose of obtaining immigration benefits and therefore lacked the good moral character required to become a United States citizen under Section 316(a)(3) of the INA, 8 U.S.C. 1427(a)(3). Pet. App. 13-14, 25-29.

4. The court of appeals affirmed the judgment of the district court ordering petitioner's denaturalization. The court noted that petitioner had not challenged the district court's finding that he gave false testimony for the purpose of obtaining immigration benefits and therefore lacked the good moral character required to become a United States citizen. The court of appeals affirmed the district court's finding that undisputed evidence established petitioner's service as an armed guard at Stutthof. The court concluded that such guard service constituted acquiescence in Nazi persecution and rendered him ineligible for a visa as a matter of law. The court rejected petitioner's arguments that eyewitness testimony was required to revoke his citizenship and that, pursuant to *Petkiewytsch* v. *INS*, 945 F.2d 871 (6th Cir. 1991), the government had to prove that he actually participated in atrocities. Pet. App. 14-20.

## ARGUMENT

1. Petitioner contends (Pet. 2-6) that the government was required to prove that he personally participated in individual acts of persecution in addition to his duties as a Nazi concentration camp guard. Petitioner's contention is without merit.

As an initial matter, petitioner does not dispute the lower court's determination that he gave false testimony in obtaining his visa and therefore lacked the moral ~~good~~ character necessary for citizenship. Because that was an 'independent bas[is] for denatural-

ization" (Pet. App. 25), petitioner's contention, even if correct, would not alter the result in this case.

In any event, petitioner was ineligible for a visa because he served as an armed concentration camp guard. In *Fedorenko* v. *United States*, 449 U.S. 490 (1981), the Court held that "an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa" as a matter of law under the Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009.[3] 449 U.S. at 512. The Court further held that the conduct of a guard "who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp" constituted assistance in persecution. *Id.* at 512 n.34.

Every court of appeals that has decided a denaturalization case regarding an armed Nazi concentration camp guard has followed *Fedorenko* in holding that guard service constitutes "assistance in persecution" and disqualifies the guard from citizenship. See *United States* v. *Linnas*, 685 F.2d 427 (2d Cir.), cert. denied, 459 U.S. 883 (1982); *United States* v. *Demjanjuk*, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982); *United States* v. *Schmidt*, 923 F.2d 1253 (7th Cir.), cert. denied, 112

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[3] Fedorenko entered the United States under Section 2(b) of the DPA. The Court determined that Section 2(b) incorporated the definition of a "displaced person" found in Annex I to the Constitution of the International Refugee Organization of the United Nations, which excluded persons who "assisted the enemy in persecuting civil populations." *Fedorenko*, 449 U.S. at 495.

S. Ct. 331 (1991); *United States* v. *Kairys*, 782 F.2d 1374 (7th Cir.), cert. denied, 476 U.S. 1153 (1986); *United States* v. *Schellong*, 717 F.2d 329 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984); *United States* v. *Tittjung*, 948 F.2d 1292 (7th Cir. 1991), cert. denied, 112 S. Ct. 3035 (1992).

Petitioner entered the United States under the Immigration Act of 1924 rather than the DPA. As the court of appeals explained, however, "the DPA provides a framework for analysis" in this case. App., *infra*, 2a. State Department regulations incorporated into the 1924 Act prohibited the admission of persons whose entry would be prejudicial to the interest of the United States, including persons who had "acquiesced in activities or conduct contrary to civilization and human decency" on behalf of the Axis powers during World War II. 22 C.F.R. 53.32, 53.33 (1949). Consequently, the 1924 Act—which proscribes mere *acquiescence* in persecution—is even more exacting than the DPA—which proscribes assistance in persecution.

The court of appeals correctly held that petitioner's service as an armed concentration camp guard made him ineligible for a visa under the 1924 Act as a matter of law.[4] Petitioner stipulated that the operation of the Stutthof concentration camp constituted activity contrary to civilization and human decency. Pet. App. 11, 23. This stipulation, in conjunction

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[4] Petitioner's assertion (Pet. 4) that "[i]t is difficult to point out the rationale of the Seventh Circuit in this matter in view of the fact that it merely issued an Order affirming the Judgment of the District Court" is mystifying. The court of appeals wrote an opinion, reprinted in the appendix to the petition, that fully explains the court's reasons for affirming the judgment of the district court.

with *Fedorenko*, requires a finding that petitioner's conduct as an armed guard constituted acquiescence in persecution in violation of the 1924 Act. Indeed, the court of appeals noted that petitioner "does not dispute the fact that service as an armed concentration [camp] guard would have barred him from obtaining his visa under the 1924 Act." App., *infra*, 2a.

2. Petitioner errs in contending (Pet. 2) that the decision in this case conflicts with the decision in *Petkiewytsch* v. *INS*, 945 F.2d 871 (6th Cir. 1991). The issue in *Petkiewytsch* was "whether a permanent resident alien who served involuntarily as a civilian guard in a German 'labor education camp' during the period of Nazi control * * * is subject to deportation" under the Holtzman Amendment to the INA, Pub. L. No. 95-549, §§ 101-105, 92 Stat. 2065-2066 (1978). 945 F.2d at 872.

The Holtzman Amendment, which was codified as Section 241(a)(19) of the INA, 8 U.S.C. 1251 (a)(19),[5] provides that an alien shall be deported if he acted under the direction of or in association with the Nazi government and "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion." Based on references to war criminals in the legislative history of the Holtzman Amendment, the *Petkiewytsch* court distinguished the Holtzman Amendment from the DPA and concluded that the Holtzman Amendment requires a "more searching" inquiry than the DPA into whether the alien engaged in persecution. After distinguishing

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[5] Section 241(a)(19) of the INA has been recodified by Section 602 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5077, and now appears at 8 U.S.C. 1251(a)(4)(D) (Supp. II 1990).

the facts of the case before it from those in *Fedorenko*, the court concluded that deporting Petkiewytsch "would not further the goal of the Holtzman Amendment and would carry out no discernible policy of the United States." 945 F.2d at 881.

*Petkiewytsch* has no application here. The *Petkiewytsch* Court added a gloss to the language of the Holtzman Amendment based on its belief that the Amendment was designed "at least in part, to accomplish a different purpose" from the DPA, 945 F.2d at 879, and based on its conclusion that the legislative history of the Amendment "appears to require active participation in persecution going beyond 'assistance.'" *Id.* at 880. We believe that the court in *Petkiewytsch* misread the legislative history of the Holtzman Amendment. But in any event, *Petkiewytsch* does petitioner no good, because no such language appears in the legislative history of the DPA or the 1924 Act. The court of appeals in *Petkiewytsch* expressly recognized that its gloss on the Holtzman Amendment would not be applicable to the DPA. 945 F.2d at 879. Because the 1924 Act is even more exacting than the DPA, it is clear that there is no conflict between *Petkiewytsch* and the court of appeals' decision in this case.

In addition, the facts of *Petkiewytsch* are quite different from the facts of this case. Petkiewytsch served in one of "the least punitive of all types of Nazi camps"; he was "at all times a reluctant civilian guard" who was imprisoned for failing to perform his duties diligently; and he was "totally exonerated" by British authorities after the war. 945 F.2d at 873, 881. The court therefore concluded that Petkiewytsch did not fit the profile of an armed concentration camp guard that was before this Court in

*Fedorenko*. Here, in contrast, petitioner was an armed, uniformed guard of the Waffen-SS (Pet. App. 22-23); petitioner stipulated that the operation of Stutthof concentration camp constituted activity and conduct contrary to civilization and human decency (*id.* at 23); and there is no evidence that petitioner was a reluctant guard or was exonerated for his guard service. Petitioner thus would not prevail even under the approach applied in *Petkiewytsch*.[6]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1992

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[6] Nor is there a conflict between this case and *Laipenieks* v. *INS*, 750 F.2d 1427 (9th Cir. 1985). See Pet. 3-4. That case, like *Petkiewytsch*, concerned the Holtzman Amendment—not the 1924 Act—and it involved a Latvian civilian police officer, not a concentration camp guard. Moreover, the holding of *Laipenieks* turned on the court's interpretation of the requirement that persecution be based on race, religion, national origin, or political opinion; the court held that the government failed to carry its burden of proving that Laipenieks' victims were persecuted because of their political beliefs. 750 F.2d at 1437.

**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

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No. 91-2649

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

ANTON BAUMANN, DEFENDANT/APPELLANT

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[Filed Mar. 31, 1992]

Appeal from the United States District Court
for the Eastern District of Wisconsin

No. 89-C-362
Thomas J. Curran, *Judge*

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Before: Hon. WILLIAM J. BAUER, Chief Judge

Plaintiff-appellees motion for modification of order is GRANTED. The order issued March 23, 1992 is modified as follows:

> Page 2, paragraph 4 which begins "Baumann entered the United States . . ."
>
> is replaced by:
>
> "Baumann entered the United States in 1947 under the Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, 43 Stat. 153 ("1924 Act"). Reg-

ulations promulgated under the 1924 Act denied admission to persons who had "acquiesced in activities or conduct contrary to civilization and human decency" on behalf of the Axis powers during World War I. The Displaced Persons Act of 1948 ("DPA"), Pub. L. No. 80-774, § 2, 62 Stat 1009 authorized European refugees to emigrate to the United States, but specifically excluded individuals who had "assisted the enemy in persecuting individuals" during World War II. Although Baumann's entry was pursuant to the 1924 Act, because the activities in question occurred during World War II, the DPA provides a framework for analysis."

Page 3 Paragraph 3 which reads:

"Therefore he was ineligible for a visa under the DPA."

should read:

"Therefore has was ineligible for a visa under the 1924 Act."

Page 3, Paragraph 4 which reads:

"He does not dispute the fact that service as an armed concentration guard would have barred him from obtaining his visa under the DPA."

should read:

"He does not dispute the fact that service as an armed concentration guard would have barred him from obtaining his visa under the 1924 Act."

Page 4, Paragraph 2 which reads:

"As a matter of law, disclosure of the fact that a petitioner served as an armed guard at a con-

centration camp makes him ineligible for a visa under the DPA."

should read:

"As a matter of law, disclosure of the fact that a petitioner served as an armed guard at a concentration camp makes him ineligible for a visa.

Page 4 Paragraph 4 which reads:

"If the government proved his service as an armed unifromed guard, it sufficiently established that he assisted in persecution of persons because of race, religion or national origin under section 13 of the DPA."

should read:

"If the government proved his service as an armed uniformed guard, it sufficiently established that he assisted in persecution of persons."

Page 4, Paragraph 3

"As a matter of law, he was ineligible for a visa under the DPA.

should read:

"As a matter of law, he was ineligible for a visa under the 1924 Act."

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